FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-6521

DONALD ABNEY, LARRY STARKS and
ALONZO ROBINSON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I.

QUESTIONS PRESENTED

1. Whether the double jeopardy clause of the Fifth Amendment provides to defendants who claim that retrial will subject them to double jeopardy, a right to have that claim considered *on its merits* prior to the second trial?

2. Whether the Court of Appeals properly reviewed the District Court's denial of petitioners' motions to

dismiss the indictment on grounds of double jeopardy where:

a. The District Court's denial finally disposed of petitioners' claims that a second trial would subject them to Double Jeopardy in violation of their Constitutional Rights?

b. Tne District Court's incorrect assumption that it was without power to decide the Double Jeopardy claim, could have been reviewed by the Circuit Court of. Appeals under its Mandamus powers?

3. Whether this Court should review the sufficiency of the indictment in this case where the Rules provide for review and to do so will not delay the proceedings and may avoid further unnecessary litigation?

II.

SUMMARY OF ARGUMENT

The Government has challenged the jurisdiction of the Court of Appeals to pass on petitioners' claims that (1) re-trial would violate the Double Jeopardy Clause of the Federal Constitution, and (2) their indictments should be dismissed for failure to state a claim. Petitioners' believe the Third Circuit properly heard this case, and that this Court therefore should consider the merits previously briefed.

A. This Court has thrice held denials of double jeopardy claims final and reviewable before re-trial. *E.g.*, *Harris v. Washington*, 404 U.S. 55, 56 (1971). Such final decisions are of course reviewable by the appropriate Circuit Court of Appeals. 28 U.S.C. §1291. Claims founded on the Double Jeopardy Clause can be vindicated only if made, and, if necessary, reviewed

before re-trial, for the Clause protects against the second, illegal trial itself. *E.g.*, *United States v. Ball*, 163 U.S. 662, 669 (1896). As Mr. Justice Frankfurter pointed out, an order entered before conviction and sentencing which, if erroneous, would destroy the constitutional right, must be considered final and appealable. *Cobbledick v. United States*, 309 U.S. 323, 328-29 (1940). *Accord*, *Stack v. Boyle*, 342 U.S. 1, 6-7 (1951). Application of this doctrine to allow an appeal here preserves intact prior restrictions on appealability. The propriety of an appeal also follows from the satisfaction of the criteria for finality set forth in *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 546 (1949).

B. Even if an appeal should be held unavailable to petitioners, this Court's jurisdiction remains unimpaired, for the Third Circuit could have properly heard the merits under its mandamus powers.

A court of appeals has the "naked power" to issue such a writ, where it could entertain an appeal at some stage of the proceedings. *E.g.*, *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 255 (1957). And when presented with an improperly filed appeal, courts of appeals have commonly acted as though mandamus were requested. *E.g.*, *Magnetic Engineering & Mfg. Co. v. Dings Mfg. Co.*, 178 F.2d 866, 869 (2d Cir. 1950) (L. Hand, J.).

Petitioners' case easily meets the traditional criteria for invoking the mandamus power. The trial judge here believed that petitioners had a "serious" double jeopardy claim, but refused to consider it because he erroneously assumed the Third Circuit had pre-empted his doing so. Such an abdication of jurisdiction is correctable by mandamus. *E.g.*, *Roche v. Evaporated Milk Association*, 319 U.S. 21, 31 (1943). Further, mandamus traditionally lies where there is no other adequate means of correcting a "failure of justice." *Rex v. Barker*, 3 Burr. 1265, 1267, 97 Eng. Rep. 823, 824

(1762). As with actions unconstitutionally removed from a jury's scrutiny, the unconstitutional imposition of a second criminal trial, absent a right of appeal, can be cured only through mandamus. To wait upon final judgement here would offer petitioners no more that the vindication of a right already dead.

C. Once this Court has assumed jurisdiction of petitioners' double joepardy claim, it should also consider the sufficiency of petitioners' indictment.

A federal appellate court with jurisdiction of an appeal on one question may consider another issue if it would result in dismissing the complaint and terminating the litigation. *Deckert v. Independence Shares Corporation*, 311 U.S. 282, 287 (1940). Here, if petitioners' indictment is insufficient, it must be dismissed. In *Schlagenhauf v. Holder*, 379 U.S. 104, 111 (1964), this Court considered an independently unreviewable question together with a question properly before it—even though the resolution of the former issue could not completely terminate the litigation. Where the decision of crucial "pendent" issues could materially advance the litigation—and here the litigation would terminate—the policy against piecemeal appeals requires their review.

III.

ARGUMENT

A. The Order of The District Court Dismissing Petitioners' Plea of Double Jeopardy is a "Final Decision" and Appealable Before Re-trial.

The jurisdictional question raised by respondent is whether the order of the trial judge overruling

petitioners' pleas of double jeopardy was a "final decision" and hence appealable to the Court of Appeals before petitioners' allegedly illegal second trial. 28 U.S.C. §1291. The Third Circuit below followed its own case and those of three other circuits in allowing the appeal.[1] Two circuits disagree.[2]

This Court has thrice held that denials of claims of former jeopardy are final before the second trial. *Harris v. Washington*, 404 U.S. 55, 56 (1971); *Colombo v. New York*, 405 U.S. 9 (1972); *Turner v. Arkansas*, 407 U.S. 366 (1972). In all three cases this Court considered the merits of double jeopardy claims brought here before trial under 28 U.S.C. §1257, which permits review only of "final judgments or decrees" of state courts.[3] In Harris this Court stated:

> Since the state courts have finally rejected a claim that the Constitution forbids a second *trial* of the petitioner, a claim separate and apart from the question of whether the petitioner may constitutionally be *convicted* of the crimes with which he is charged, our jurisdiction is properly invoked under 28 U.S.C. §1257.

404 U.S. at 56 (emphasis in original).[4]

This statement recognizes the obvious: The right of citizens not to be twice jeopardized can only be protected by allowing claims upon it to be made and, if necessary, reviewed before retrial. If petitioners must wait until after trial to obtain review of their double jeopardy plea, this right will have been forfeited.

Of course, the Double Jeopardy Clause protects not only against double conviction and punishment, or conviction and punishment after acquittal, but against the second, illegal trial itself: "The prohibition is not against being twice punished, but against being twice put in jeopardy." *United States v. Ball*, 163 U.S. 662, 669 (1896). *Accord, United States v. Dinitz*, 96 S. Ct.

1075, 1079 (1976); *United States v. Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion of Harlan, J.); *Green v. United States*, 355 U.S. 184, 187-88 (1957). The citizen's freedom from trial twice imposed was deeply rooted in the Anglo-American tradition long before Ball:

> The common law not only prohibited a second punishment for the same offense, but it went further and forbid a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.

Ex parte Lange, 85 U.S. (18 Wall.) 163, 169 (Oct. 1873 term), *citing*[4] *Blackstone's Commentaries* 315; *see Lange, supra* at 178.

Mr. Justice Frankfurter, in *Cobbledick v. United States*, 309 U.S. 373, 328-29 (1940) decisively demonstrated that an order which, if erroneous, would destroy a constitutional right of a party before that party has been convicted and sentenced must be considered final and appealable. The Justice discussed *Perlman v. United States*, 247 U.S. 7 (1918):

> There, exhibits owned by Perlman and impounded in court during a patent suite were . . . directed to be produced before a grand jury. Perlman petitioned the district court to prohibit this use, invoking a constitutional privilege. The petition was denied and Perlman sought review here. The United States claimed that the action of the district court was "not final" but merely interlocutory and therefore not reviewable by this Court. We rejected the Government's contention. To have held otherwise would have rendered Perlman "powerless to avert the mischief of the order . . ." 247 U.S. at 13. . . . To have denied him opportunity for review on the theory that the district court's order was interlocutory would have made the doctrine of finality a means of denying Perlman any appellate review of his constitutional claim. *Due regard for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statutes.*

309 U.S. at 328-29 (footnote omitted emphasis supplied). Similarly, in *Stack v. Boyle*, 342 U.S. 1, 6-7 (1951), denial of a motion to reduce unconstitutionally high bail was held appealable before trial. Otherwise the right to reasonable bail would have been lost forever. *Cf.* 9 *J. Moore Federal Practice* ¶110.10 at 134 (an order which "effectively end[s] . . . the whole federal claim or right asserted" should be appealable, citing *Stack*).[5]

The rule urged by petitioners is a direct application, not an extension, of prior appealability doctrine. *Perlman*, *Stack*, and the case at bar are unusual in that the basic right to be protected is threatened with extinction before final conviction. Other cases, however, will remain unappealable.[6]

The government argues that denial of a right asserted under the Double Jeopardy Clause is not final under the doctrine of *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 546 (1949). Under Cohen, a decision which does not completely dispose of a case is final if it appears to fall in that small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause of action itself to require that appellate consideration be deferred until the whole case is adjudicated. The government asserts that a double jeopardy claim is not collateral to the main cause of conviction: the defendant can protect his right not to be doubly punished under the Clause by post-conviction appeal.

To hold this, however, would be to overrule the entire line of cases from *Ex parte Lange and United States v. Dinitz*, all *supra*, and to hold that the Double Jeopardy Clause does not protect against being twice tried for the same offense. The assertion of this right cannot merge into a judgment upon retrial: the retrial destroys it. That petitioners' claim under the clause is collateral to the main cause of action here was demonstrated both in *Harris*, quoted *supra*, and *United States v. Lansdown*, 460 F.2d 164, 171 (4th Cir. 1972):

> First, defendant's right is under the fifth amendment and it is separable from, and collateral to, the main cause of action which is whether he is innocent or guilty of the crimes charged. Second, the right claimed is a constitutional one and, as such, it is too important to be denied review. Finally, if review is not had now, the right claimed—to be free from being twice forced to stand trial for the same offense—will be irreparably lost.

Of course, the final judgment rule generally governs appeals in the federal courts, particularly in criminal prosecutions. *DiBella v. United States*, 369 U.S. 121, 126 (1962). Yet the statement, "Every statutory exception [to finalty] is addressed either in terms or by necessary operation solely to civil actions," *id.*, does not mean that no order in a criminal case can ever be appealed before judgment of conviction and sentence. As demonstrated above, petitioners here in fact meet the finality requirement for appeal under §1291, and need not fit themselves into any statutory exception.[7] Were the *DiBella* language read to forbid all presentence appeals in criminal cases, review could not have been had in either *Perlman v. United States*, *supra*, or *Stack v. Boyle*, *supra*, which was specifically approved in *DiBella*, 369 U.S. at 126. *Cf. Mills v. Alabama*, 384

U.S. 214, 217-18 (1966) (appeal of controlling constitutional question answered by state court before trial taken as final under §1257); *Harris v. Washington*, *Colombo v. New York*, and *Turner v. Arkansas*, all *supra* (double jeopardy cases).

B. Absent The Right of Appeal, The Court Below Had Jurisdiction Pursuant to its Mandamus Powers

The Government challenges this Court's jurisdiction to hear petitioners' claim of double jeopardy, arguing that an appeal to the Court of Appeals was not an available remedy. As noted above, we disagree. But even if the Government were correct in its contention that an appeal did not lie, its conclusion that this Court lacks power to grant relief does not follow.

Assuming arguendo the unavailability of appeal, the Third Circuit should have reached the merits of the constitutional claim (as it did) by treating petitioners' notice of appeal as an application for a writ of mandamus. The conditions upon which the availability of the extraordinary writ depend are satisfied in this case if this Court finds petitioners' appeal inappropriate.

It is, of course, plain under the All Writs Act that a court of appeals has the "naked power" to issue such a writ where it could "at some stage of the . . . proceedings" entertain an appeal. *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 255 (1957). *See FTC v. Dean Foods Co.*, 384 U.S. 597, 603-04 (1966).[9]

Moreover, as Judge Learned Hand observed in *Magnetic Engineering & Mfg. Co. v. Dings Mfg. Co.*, 178 F.2d 866, 869 (2d Cir. 1950),

> [I]f we should have jurisdiction to issue the writ, had the plaintiff applied for it at the time

> when it appealed, we think that we ought to grant it now, ignoring what is at best only a matter of form; and for that reason we hold we are free to treat the appeal as a petition for mandamus.[10]

The point has particular force where, as here, petitioners, in seeking relief by way of interlocutory appeal rather than mandamus, were simply following the law of the circuit as expressed in *United States v. DiSilvio*, 520 F.2d 247 (3d Cir.), *cert. denied*, 423 U.S. 1015 (1975).[11]

Petitioners' case easily meets the accepted criteria for invoking the mandamus power. First, the district judge's order denying petitioners' double jeopardy motion rested on his conclusion that he was without authority to consider its merit. Thus, his decision was based *solely* on the previous Third Circuit opinion involving petitioners, *United States v. Starks*, 515 F.2d 112 (3d Cir. 1975), in which double jeopardy was neither briefed, argued, nor decided. Although he considered the claim deserving of "very serious consideration," the trial judge erroneously assumed that he was precluded from deciding it "in the first instance" (Appendix 49) because the Third Circuit, after reversing the first trial for an erroneous evidentiary ruling, had remanded for a new trial. To be sure, that opinion contained "certain rather explicit suggestions and instructions" (Appendix 44) for the anticipated retrial—suggestions prompted by the host of errors and near-errors committed at the first trial, *Starks, supra*, 515 F.2d at 118, 123-24, 125. It should not have been construed, however, to support the extraordinary proposition that, irrespective of any motions, change in circumstance or additional errors, a second trial was unconditionally mandated.

The short of the matter is that petitioners never had a chance to have the district court consider the motion

on its merits. The trial judge, in taking the Circuit Court's *pro forma* order of a new trial (in essence a ruling that the original trial was tainted by error) as a ruling upon the double jeopardy claim never before the appellate court, clearly abdicated his *nisi prius* jurisdiction to decide the issue. Such an abdication is subject to review by mandamus. *Roche v. Evaporated Milk Association*, 319 U.S. 21, 31 (1943); *See Johnston v. Marsh*, 227 F.2d 528 (3d Cir. 1955). Thus the Third Circuit appropriately decided the case, irrespective of whether its decision had the practical effect of affirming the refusal below to pass on the merits.

Secondly, and no less importantly, we rely on the principle, dating back to *Rex v. Barker*, 3 Burr. 1265, 1267, 97 Eng. Rep. 823, 824 (k.B. 1762), that mandamus lies where there is no other adequate means of correcting "a failure of justice." *See Ex parte Peru*, 318 U.S. 578. 586-87 (1943); *Donnelly v. Parker*, 486 F.2d 402, 408 (D.C. Cir. 1973); *Carter v. Seamans*, 411 F.2d 767, 773 (5th Cir. 1969), *cert. denied*, 397 U.S. 941 (1970). Surely, the harrassment of a second, illegal *criminal* trial is no less unjust than the burden of being required to undergo a civil trial improperly referred to a master, *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957), a civil trial improperly transferred to another district, *Hoffman v. Blaski*, 363 U.S. 335, 340-41n.9 (1960), or a civil trial in contravention of the right to a jury, *Beacon Theatres v. Westover*, 359 U.S. 500, 511 (1959); *Ex parte Peterson*, 253 U.S. 300, 305-06 (1920); *Ex parte Simons*, 247 U.S. 231, 239-40 (1918).[5] As we have indicated above, it is the vital function of the double jeopardy clause of the Constitution to save the defendant from being impermissibly forced to run the gauntlet of prosecution a second time. A victory for petitioners on final judgment, should relief be denied here, would indeed

"be a barren one." *Hartly Pen Co. v. United States District Court,* 287 F.2d 324, 330 (9th Cir. 1961).

It remains only to point out that, if this Court deems mandamus rather than appeal the appropriate remedy in the instant case, no useful purpose would be served by dismissing the writ of certiorari and inviting petitioners to proceed anew by filing an application for mandamus in the Court of Appeals. That court has already addressed the merits of the double jeopardy claim. This Court has granted certiorari and the merits have been fully briefed. The matter is accordingly ripe for review now.

C. The Sufficiency of Petitioners' Indictment is Properly Before This Court.

One this Court has assumed jurisdiction of petitioners' double jeopardy claim (whether on the "appellate" or "mandamus" theory), it should also consider the sufficiency of petitioners' indictment. The court below properly exercised its jurisdiction by addressing this claim on the merits.

A federal appellate court which has jurisidction of an appeal on one question involved in a case, here the double jeopardy question, need not confine itself to the original order appealed; "If insuperable objection to maintaining the bill clearly appears, it may be dismissed and the litigation terminated." *Deckert v. Independence Shares Corporation,* 311 U.S. 282, 287 (1940) (and cases cited therein), *quoting Meccano, Ltd. v. John Wanamaker, N.Y.,* 253 U.S. 136, 141 (1920). Since petitioners' bill of indictment is insufficient, there is such an "insuperable objection: requiring its dismissal. And in *Schlagenhauf v. Holder,* 379 U.S. 104, 111 (1964), a question not suitable for mandamus when considered by itself was considered by this Court along

with a question that was appropriate, because such consideration promoted the efficient litigation of that case. In *Schlagenhauf,* answering the "pendent" question might have speeded the litigation, but could not formally end it; thus the justification for considering petitioners' claim on their indictment is even stronger than required by precedent.

The question of the sufficiency of petitioners' indictment may be considered now even though, standing alone, it could not be addressed until after conviction. *Chicago, Rock Island & Pacific R. Co. v. Stude,* 346 U.S. 574, 578 (1954); *Schlagenhauf v. Holder, supra.* In *Stude,* an original action in a federal district court and an action removed from a state court had been treated together by both the litigants and the district court. The district court dismissed the original action but refused to remand the removed action to the state court. This court allowed appeal of the refusal to remand because it

> may be considered as assigned in a case involving an appealable order, the order dismissing the [original] complaint and the action. This is true despite the fact that the order denying the motion to remand standing alone would not be appealable.

Id. at 578, citing *Deckert v. Independence Shares Corporation, supra. See United States v. MacDonald,* 531 F.2d 196, 199 (4th Cir.), *petition for cert. filed* (June 29, 1976) (No. 75-1892) 43 U.S.L.W. 3005. (case dismissed on speedy trial ground, not independently appealable before trial, when "pendent" to double jeopardy plea).[13]

Note that in *Stude,* the consideration of the motion to remand could take the case out of federal court, but could not terminate the litigation altogether. Holding petitioners' indictment insufficient will end the litigation against them; thus efficiency requires examining

petitioners' claim now even more clearly than it required examining the claim in *Stude. See Schlagenhauf v. Holder, supra.*

The policy against piecemeal appeals ordinarily suggests that an appellate court wait for completion of all litigation below before considering questions; here, by contrast, it requires consideration of petitioners' indictment pendent to an appealable question. Consideration of the indictment does not slow up this litigation now, for the double jeopardy claim is on appeal; but refusal to consider it virtually assures that if petitioners are convicted an appeal will follow. This consideration has led three Justices to suggest that in some circumstances "pendent" appeals should be considered mandatory, not merely acceptable. "Otherwise wasteful litigation is invited, and the losing party on the merits is given another bite at the apple." *Alligator Co. v. La Chemise Lacoste*, 421 U.S. 937, 938-39 (1975) (White, Blackmun, and Powell, JJ., dissenting from denial of certiorari).

It is no objection to jurisdiction here that petitioners challenged the sufficiency of the indictment for the first time in the Court of Appeals. Federal Rule of Criminal Procedure 12(b)(2) allows claims that an indictment fails to state an offense to be raised at any time during the proceeding. This has consistently been held to allow the question to be raised for the first time on appeal. *E.g. United States v. Seuss*, 474 F.2d 385 (1st Cir.), *cert. denied*, 412 U.S. 928 (1973); *United States v. Beard*, 414 F.2d 1014 (3d Cir. 1969).

Finally, failure to raise the question in the trial court has nothing to do with the issue of this Court's jurisdiction. The case is properly in this Court and, as emphasized above, disposition of the merits of both issues presented will expedite the entire case.[4]

IV.

CONCLUSION

The Court of Appeals for the Third Circuit properly exercised its power of appellate review when it took jurisdiction of petitioners' claims that the Double Jeopardy Clause and the insufficiency of the indictment bar their re-trial. This Court should therefore now decide petitioners' claims, and reverse the decision below on the merits.

Respectfully submitted,

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FOOTNOTES

[1] The leading Third Circuit case is *United States v. DiSilvio*, 520 F.2d 247 (3d Cir.), *cert. denied*, 423 U.S. 1015 (1975).

The first case to allow such an appeal was *United States v. Lansdown*, 460 F.2d 164 (4th Cir. 1972). *Accord, United States v. Beckerman*, 516 F.2d 905 (2d Cir. 1975); *United States v. Alessi*, No. 76-1189 (2d Cir. July 7, 1976), *petition for cert. filed*, 45 U.S.L.W. 3133 (Aug. 6, 1976), (No. 76-176) (dubitante); *United States v. Barket*, 530 F.2d 181 (8th Cir. 1975), *cert. denied*, (November 1, 1976), (No. 75-1280). *Cf. Thomas v. Beasly*, 491 F.2d 507 (6th Cir.), *cert. denied*, 417 U.S. 955 (1974) (petitioner allowed to invoke federal *Habeas* before retrial, claiming double jeopardy, because he had exhausted all state remedies to protect his right not to be twice jeopardized).

[2] *United States v. Bailey*, 512 F.2d 833 (5th Cir.), *cert dismissed*, 423 U.S. 1039 (1975); *United States v. Young*, No. 75-3102 (9th Cir. October 19, 1976).

Cf. United States v. Bartemio, No. 76-1039 (7th Cir. April 5, 1976), *petition for cert. filed*, No. 75-6657 (dismissing double jeopardy appeal without opinion) (as cited in Government brief).

[3] The same basic principles of finality govern both 28 U.S.C. §§1291 ("final decisions" of U.S. District Courts appealable) & 1257 ("final judgments or decrees" of highest state courts reviewable by U.S. Supreme Court). *See Local No. 438, Construction Laborers Union v. Curry*, 371 U.S. 542, 549 (1963), sustaining review under §1257 for precisely the same reasons earlier stated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949) (construing §1291).

[4] *Harris, Colombo,* and *Turner* do not by name overrule *Rankin v. The State*, 78 U.S. (11 Wall.) 389 (Dec. 1870 term) (plea of double jeopardy denied in state system not reviewable by Supreme Court before second trial). All four cases, however, can be reconciled. In 1870, the double jeopardy clause had not been applied to the states. Thus a citizen had no recognized *federal* right not to be tried a second time in the state courts, and his right not to be deprived of life, liberty or property without due process of law could be protected by review after conviction. Now the citizen has the right not to be twice jeopardized in state court. Cases cited in text immediately *infra*

define the double jeopardy right and *Benton v. Maryland*, 395 U.S. 784 (1969), applies it to the states. Thus the recent cases allow Supreme Court review to protect that right.

The double jeopardy dictum in *Heike v. United States*, 217 U.S. 423, 432-33 (1910) can be similarly explained. To the extent that it says that "the overruling of a plea of former conviction or acquittal has never been held . . . to give a right of review before final judgment [of conviction]." It has clearly been rejected by *Harris, Colombo,* and *Turner.*

[5] Certain rights which citizens must enforce before trial may be protected in ways other than the appeals provision of §1291. For example, where a citizen alleges that a prosecution is brought against him in bad faith, and that his state trial would harrass him in violation of his first and fourteenth amendment rights, his remedy is not appeal through the state system to the Supreme Court (under §1257) before trial, but a separate action under 42 U.S.C. §1983. *Compare, e.g., Dombrowski v. Pfister*, 380 U.S. 479 (1965), *with Younger v. Harris*, 401 U.S. 37 (1971). Similarly, all questions of federal bail, one type of which was held appealable under §1291 in *Stack v. Boyle*, 342 U.S. 1, 6 (1951), are today reviewed under 18 U.S.C. §3147 (enacted 1966).

Thus the doctrine of appealability under §1291 which petitioners urge is limited even further than Justice Frankfurter's *Cobbledick* opinion requires. Not all motions to protect rights which will be destroyed before post-judgment appeal need be appealable before trial, but only those which, as here, Congress has not provided with another means of protection.

[6] For example, while the facts of *Cobbledick* are similar to those of *Perlman*, Cobbledick, unlike Perlman, could protect himself from giving the evidence by refusing to turn it over and appealing a citation for contempt. Thus this Court properly refused to allow him an interlocutory appeal.

Similarly, in *Heike v. United States*, 217 U.S. 423 (1910), the plaintiff in error had been granted immunity and had been compelled to testify as to certain matters. He was then indicted, he claimed, for a crime of which he could not be convicted because of the immunity. This Court refused jurisdiction of his pretrial appeal. Heike had already testified under compulsion, so that the only violation of his fifth amendment rights which could occur at the time was his conviction and punishment "out of his own mouth." Appeal after conviction was adequate security

against that possibility. (note 2 *supra* explains the double jeopardy dictum in this case.)

In the typical case of a defendant moving to exclude illegally seized evidence or a coerced confession from a trial, appeal will also remain unavailable. *Cogen v. United States*, 278 U.S. 211 (1929) (illegally seized evidence); *DiBella v. United States*, 369 U.S. 121 (1962) (same). A defendant's right to be punished only on the basis of constitutionally obtained evidence can be vindicated on post-conviction appeal. His right not to be coerced, not to have his privacy invaded, cannot be protected by pretrial appeal, for this violation has already occurred.

[7]An example of such a statutory exception is 28 U.S.C. §1292(b), allowing certain interlocutory appeals in civil cases.

[8]"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. §1651(a) (1970).

[9]*Compare Blay v. Young*, 509 F.2d 650 (6th Cir. 1974) (statute required United States Supreme Court to hear all appeals from the three-judge court, thus available to Circuit court as "in aid" of that court's jurisdiction).

[10]*Accord, Western Geophysical Co. of America, Inc. v. Bolt Associates, Inc.*, 440 F.2d 765, 769 (2d Cir. 1971) (Friendly, J.); *Woodcock v. Donnelly*, 470 F.2d 93, 94 (1st Cir. 1972) (*per curiam*); *Hackett v. General Host Corp.*, 455 F.2d 618, 626 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972); *International Nickle Co. v. Martin J. Barry, Inc.*, 204 F.2d 583, 585 (4th Cir. 1953); *United States v. Briggs*, 514 F.2d 794, 808 (5th Cir. 1975); *Shapiro v. Bonanza Hotel Co.*, 185 F.2d 777, 779 (9th Cir. 1950); *Flora Construction Co. v. Fireman's Fund Insurance Co.*, 307 F.2d 413 (10th Cir. 1962), *cert. denied*, 371 U.S. 950 (1963); *see generally* 9 J. MOORE, FEDERAL PRACTICE ¶ 110.26 at 316 & n.73 (2d ed. 1975).

[11]It is true that there is a difference in form between the mandamus and appeal procedures, in that the former is usually brought against the judge who issued the challenged order. That can hardly be deemed a difference in substance. This Court's discomfort with the mandamus procedure, expressed in *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384-85 (1953), to the effect that the district judge ought not lightly be made a litigant has been mooted by the Third Circuit in *Rapp v. Van Dusen*, 350 F.2d 806, 810-13 (3d Cir. 1965); *Texaco Inc. v. Borda*, 383 F.2d 607 (3d Cir. 1967) and by Fed. R. App. P. 21(b). The current practice is to make the district judge but a nominal respondent, with no obligation to take part in the proceedings. *See General Tire & Rubber Co. v. Watkins*, 363 F.2d 87, 89 (4th Cir.), *cert. denied*, 385 U.S. 899 (1966); *A. Olinick & Sons v. Dempster Bros., Inc.*, 365 F.2d 439, 442 (2d Cir. 1966); 9 *J. Moore, Federal Practice* ¶ 221.03 at 3405 (2d ed. 1975). An apt analogue to the present case is the common situation in which this Court treats an improperly filed appeal as a petition for a writ of *certiorari*.

[12]*See generally*, Note, *Mandamus Proceedings In The Federal Courts of Appeals: A Compromise With Finality*, 52 *Cal. L. Rev.* 1036, 1046-47 (1964). The Government in this case acknowledges mandamus to be a proper remedy, specifically endorsing its use where a district court has "refused to exercise the authority with which it is endowed" or where the trial judge rejects "seemingly meritorious double jeopardy claims without giving them serious consideration." Brief for the United States at 54, 55. The Government has described precisely the facts of this case, as we point out, *supra*.

[13]In *MacDonald* the court stated that the speedy trial claim was considered because of the "extraordinary" nature of the case. In *United States v. Barket*, 530 F.2d 181, 186 (8th Cir. 1975), *cert. denied*, (November 1, 1976), (No. 75-1280), the court of appeals refused to consider a claim that the indictment of appellant was insufficient or that he was charged under an unconstitutional statute. The court did not hold itself without power to consider the claim if it had felt that justice would have been speeded thereby. The *Barket* court may well have concluded that the constitutional question would turn upon the particular application of the statute to the facts of Barket's case, which would only become clear through trial testimony. *See* note 7 *infra*. These cases indicate at most that a court of appeals has discretion not to consider "pendent" appellate claims. *Cf. United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) (district judge has discretion whether or not to consider state claims pendent to federal claims). Because of the efficiency in considering the sufficiency of petitioners' indictment now, the court below exercised its discretion wisely in agreeing to consider it, and it is properly before this Court.

[14]Obviously, the class of questions which can be brought up for review in this manner should be limited to those that can be intelligently decided on the record before the appellate court. Here the record is complete – the indictment either does or does not state a federal offense in proper form and the court below has already registered its opinion on the question.